Food Mart Eureka, Inc. *and* United Food and Commercial Workers Union, Local 101, United Food and Commercial Workers International Union, AFL–CIO. Cases 20–CA–26545–1 and 20–CA–26545–2

July 18, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 7, 1997, Administrative Law Judge Frederick C. Herzog issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief supporting the cross-exceptions and answering the General Counsel's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The judge found that neither Earl Schmidt nor Roger Schilowsky is a supervisor within the meaning of Sec. 2(11) of the Act. We find it unnecessary to pass on their supervisory status. In this regard, we note that the General Counsel never alleged in the complaint or at the hearing that Schmidt was a statutory supervisor. Further, regarding Schilowsky, we note that, since he was hired in 1971 until the meat department contract expired January 31, 1995, Schilowsky was always a bargaining unit member whose terms and conditions of employment were established by the parties' successive collective-bargaining agreements. The Board has long held that conduct by a supervisor who has been included in the bargaining unit by the parties generally is not attributable to his employer, absent evidence that the employer encouraged, authorized, or ratified the supervisor's conduct. See, e.g., *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957); *A.T. & K. Enterprises*, 264 NLRB 1278 (1982); and *Bennington Iron Works*, 267 NLRB 1285 (1983). Even if Schilowsky were a supervisor, the record here contains no evidence that the Respondent encouraged, authorized, ratified, or in any way acted in a manner that would lead employees reasonably to believe that Schilowsky was acting on its behalf in circulating and soliciting signatures on the antiunion petition at issue.

Marilyn O'Rourke, Esq., for the General Counsel.
Morton Orenstein, Esq. (Schachter, Kristoff, Orenstein & Berkowitz), of San Francisco, California, for the Respondent.
John Fouts, Esq., of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Eureka, California, on October 24, 25, and 26, 1995, and is based on a charge filed on February 10, 1995, by United Food and Commercial Workers Union, Local 101, United Food and Commercial Workers International Union, AFL–CIO (the Union) alleging generally that Food Mart Eureka, Inc. (Respondent) committed certain violations of Section 8(a)(1) and (5)[1] of the National Labor Relations Act (the Act). On April 17, 1995, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) and (5) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the brief filed by counsel for the General Counsel, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the answer admits that Respondent is a corporation, with an office and places of business in Eureka, Fortuna, and McKinleyville, California, where at all times material it has been engaged in retail sales of groceries and related products; that during the calendar year ending on December 31, 1994, it derived gross revenues in excess of $500,000 from such operations; and that during the same time it purchased and received at its facilities goods valued in excess of $5000 which originated from points outside the State of California.

Accordingly, I find and conclude that Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Background and Labor Relations History*

For many years Respondent has operated its three comprehensive grocery stores located in Eureka, Fortuna, and McKinleyville, all in California. Its owner and president is Peter Vellotini Sr.

For at least 25 years the Respondent and the Union have peacefully been parties to successive collective-bargaining agreements covering employees of the three stores in two separate units, with each being covered by its own separate

[1] The charge was subsequently amended to allege violations of Sec. 8(a)(3) as well.

contract. These contracts made provision for union security, but not for the checkoff of dues.

Generally speaking, there is one unit and contract for the meat departments, and another unit and contract for the rest of the stores' employees, i.e., the clerks.

The full description of the "meat department" unit is:

> All full time and regular part time meat cutters and meat clerks employed in the meat departments of (Respondent) at facilities located in Eureka, Fortuna, and McKinleyville, California; excluding all other employees, clean-up employees, food store clerks, non-selling employees, office clerical employees, and supervisors, as defined in the National Labor Relations Act, as amended.

The full description of the "sales clerks and non-selling employees" unit is:

> All full time and regular part time sales clerks and non-selling employees employed by (Respondent) at facilities located in Eureka, Fortuna, and McKinleyville, California; excluding all other employees meat cutters, meat clerks, clean-up employees, office clerical employees and supervisors, as defined in the National Labor Relations Act, as amended.

B. *The Issues*

As shown below, when the Union demanded bargaining for successor contracts in the fall and winter of 1994 and 1995, the Respondent refused to negotiate, and took the position that it held a good-faith doubt of the Union's continuing majority, based on petitions it had received from its employees.

Based on my count of the numbers of employees set forth on the lists, and having counted the numbers of employee signatures, it is apparent that the petitions contain the signatures of a majority of employees in both units. Thus, the petitions appear to provide prima facie evidence that the Respondent had been notified in a timely fashion by a majority of the employees in each of the units that they did not desire to be represented by the Union.

Thus, Respondent contends that its actions in refusing to negotiate and withdrawing recognition were lawful. Quite obviously, this is the ultimate issue in this case.

While conceding that there were no independent violations of Section 8(a)(1) of the Act in this case, counsel for the General Counsel counters Respondent's contention by offering evidence and argument to the effect that the petitions mentioned above violated Section 8(a)(5) of the Act, because they were "tainted," when they were later used by Respondent as the basis of its alleged good-faith doubt of the Union's continuing majority status. Generally speaking, her argument is that the petitions were obtained by Respondent through unfair labor practices, i.e., they were solicited and aggressively sought by persons:

- who were supervisors; or,
- who had the apparent authority of supervisors; or,
- whose actions were either ratified; or,
- whose actions were not disclaimed by Respondent.

According to counsel for the General Counsel, there were two persons who were responsible for the circulation of the petitions. One was Roger Schilowsky (for the meat departments) and the other was Earl Schmidt (for the clerks). She further claims that the evidence shows them both to be supervisors or agents of Respondent (based on the General Counsel's theory of "apparent authority" and/or "ratification").

Respondent, of course, denies all this, while, at the same time, agreeing with the General Counsel's claim that both men were leadmen. However, so far as the General Counsel's theory of "apparent authority" is concerned, Respondent takes the position that, while it does not deny certain factors alleged by the General Counsel (such as that the solicitation for the petitions occurred upon Respondent's premises, or during working time, or may have been known to Respondent), the existence of such factors does not add up to "apparent authority" or "ratification."

C. *The Facts*[2]

1. The genesis of this case

According to counsel for the General Counsel, the genesis of this dispute was the Union's expulsion of Schilowsky and Schmidt[3] from the Union in 1994. According to Harold Barling, the Union's representative who worked with the Respondent's contracts prior to his retirement, the expulsions were carried out in order to prevent Schilowsky and Schmidt, and others, from dominating its meetings. Whatever the reasons, the parties are in agreement that both men remained in their respective units under the contracts, regardless of the fact that they were no longer members of the Union.

As further causation for this dispute, Barling went on to relate how, in early 1994, he learned that a number of employees were working for Respondent who had not, as required by the collective-bargaining agreements, been reported to the Union as being newly hired. Barling was of the view that Respondent's motive in failing in its duty to notify the Union was to create disaffection among employees. As he related, such disaffection would naturally flow from employees' dismay at being presented with bills for union dues covering a long period of time because they hadn't had the opportunity to know of and pay their bills as they accrued. By letter, Barling protested Respondent's failure to notify it, and requested information regarding the affected employees. Respondent denied any malevolent intent, saying that it resulted from an administrative foul up. All this led to the matter being resolved by submission to a board of adjustment, wherein Respondent agreed to follow the collective-bargaining agreements in the future.

---

[2] I have carefully and thoroughly examined the record in this case. I have not, however, attempted to set forth in the summary which follows each and every fact or consideration which entered into my thinking in determining the outcome of this case. Instead, I have set forth those facts which seemed to me to be most important. In doing so, I have attempted to assure that all facts and/or viewpoints which were of importance to the losing party were given fullest exposure.

[3] Along with four other persons employed by Respondent whose status as supervisors is conceded by Respondent.

2. Respondent's refusal to negotiate

The most recent of the meat department contracts expired on January 31, 1995. The most recent of the sales clerks and nonselling employees contracts expired on March 31, 1995.

It was stipulated that beginning on February 1, 1995, Respondent made changes in the terms and conditions of employment of the employees in the meat department unit, and that beginning on April 1, 1995, Respondent made changes in the terms and conditions of employment of the employees in the sales clerks and nonselling employees unit.

The Union sent Respondent a letter on October 28, 1994, in which it requested that Respondent contact it to make arrangements to commence negotiations on a successor contract to the soon-to-expire meat department contract. A similar letter was sent to Respondent on January 16, 1995, with respect to beginning negotiations for a successor contract for the soon-to-expire sales clerks and nonselling employees contract.

Respondent's labor counsel responded to the Union's October 28 letter on November 21, 1994, stating inter alia that, "In your communication you indicate that [the Union] wishes to commence negotiations for a successor labor contract. [Respondent] declines your request." The letter went on to assert that Respondent had a good-faith reasonable doubt as to the Union's continuing representative majority status. It did, however, assure that Respondent would abide by the current agreement until it expired.

Similarly, Respondent's labor counsel responded on January 23, 1995, to the Union's January 16 letter, by notifying that Respondent would terminate the sales clerks and nonselling employees contract on its expiration, based on its alleged good-faith reasonable doubt that the Union continued to enjoy majority status among the employees in the unit.

3. The petitions

The record contains "petitions" which appear to have been signed by a number of employees of Respondent. Each "petition" bears the heading, "WE DO NOT WANT [THE UNION] TO BE OUR BARGAINING REPRESENTATIVE," followed by employee signatures.

The "meat department" petition bears nine signatures, which are dated from September 19, 1994, to October 11, 1994. It is undisputed that this petition was handed to Respondent by an employee. The record contains a list of meat department employees as of November 21, 1994, showing the names of the nine who signed the petition.

The "sales clerks department" petition bears 31 signatures, which are dated from November 3, 1994, to January 23, 1995. According to the testimony of Schmidt, there were but three employees who did not sign the petition. However, according to documentary evidence stipulated into the record, there were 45 employees in this unit.

4. Supervisory or special status of Schilowsky and Schmidt

Schmidt testified that he serves as a produce clerk. He denied that he is a "produce supervisor," though he admitted to being called the produce manager or senior produce clerk. He described his duties as setting up the produce on stands, plus placing orders and doing the ads for Respondent. He denied giving orders to other employees, though he admitted that he corrects the work of his "second" man. He denies that he told Griffin of his demotion, but says also that it's been at least 20 years since it happened. He acknowledged that he has a little office upstairs, which he shares. Schmidt, a credible witness, admitted that he'd accompanied Respondent's officials to out-of-town meetings, but said that he did so as directed to assist management. He claimed to know nothing of any Christmas dinners. He also denied playing golf, and said that he hadn't for many years, and had never done so with [ ]. In sum, he claimed to have no supervisory indicia, and stated that he got only regular contractual benefits and wage rates.

Roger Schilowsky, a highly credible witness, testified that he is sometimes called a meat manager. In his job he cuts meat, orders meat, sets prices, and writes ads. He goes to the other two meat departments to see how things are going. He does work schedules for all three stores. He sets vacations but, if there's a problem, he takes it to Charley Anderson. He interviews meatcutters before they're hired, and no one else does so. He does it for all three stores, and no one else does so. He recommends the ones to hire to Charley Anderson, and his recommendation is always taken. He has been the head meatcutter for years and years, and has long been a member of the Union. It was stipulated that his wages, benefits, etc., are, and have been, governed by the collective-bargaining agreement. He receives a bonus each year based on profits, which is discretionary. He schedules work and vacation, but all such scheduling is either routine or is done by resort to the collective-bargaining agreement terms. He orders meat during only about 1 hour per week, and cuts meat the rest of the time. He writes ads for the newspaper; but it is a standard ad, varying only according to the meat available. The last meatcutter or meat clerk hired was years and years ago. Both the meatcutters he's participated in hiring had previously worked with the Respondent, or its predecessor. He doesn't transfer an employee except for coverage. He denied possessing each of the statutory indicia, in turn. He admitted that he was asked sometimes to go on business trips with the Respondent, the last being in February 1995, to Las Vegas. He also went to Medford, Oregon, in May 1995. Finally, he admitted that he receives bonuses.

Kenneth Griffin, who appeared credible, testified that Schmidt's duties included taking orders for produce, including from other stores, as a buyer. Griffin also claimed that Schmidt sets the produce prices himself. He said that Schmidt assigned work to employees, and that he called employees up front to check if needed. He also recounted that Schmidt went to Las Vegas about a year earlier, together with Schilowsky and various management officials, in order to evaluate and possibly buy equipment at a convention. Griffin also stated that Schmidt goes on buying trips to San Francisco with the owner about twice a year, that up to about 5 years ago, Schmidt and Schilowsky, with their spouses, used to attend a Christmas dinner for management officials of Respondent and, that according to rumors, Schmidt used to play golf with the owner, though he couldn't say how long ago that was. Griffin acknowledged that throughout his tenure, until they were expelled by the Union, Schmidt and Schilowsky, and various management officials, were covered by the Union's contracts, and attended union meetings, freely and openly discussing union matters, including contract proposals, with other employees. Griffin has a key to the store,

since he opens and closes the store, including counting the till. In fact he has on occasion ordered the produce himself. Both he and Schmidt stock produce, right alongside one another. Both of them order groceries. And Griffin works on the floor of the store, building displays, and cleaning produce, and stacking it, just like all other produce clerks. While Schmidt appeared in some ads for Respondent, so did other employees. The ads themselves are standard. When Schmidt isn't on the floor working, he works in an office upstairs, where a secretary and management work. However, Griffin also uses this office, a small space, to place orders for produce.

The testimony of Likhi Tanski was to the effect that he works as a produce clerk at the Fortuna store. Tanski was led to testify in conclusionary terms that Earl Schmidt is his supervisor and has been for the last year, since he's been in Eureka. However, when asked specifically about Schmidt's supervision, he testified:

> Q. And how does he supervise you?
> A. He doesn't really. He just runs the produce department.
> Q. Does he give you work instructions?
> A. Occasionally.

Avelino Homem credibly testified that he is a meat department clerk, and that he and Schilowsky do the same sort of work.

Robert Parker, a credible witness, testified, in response to a question which called for a conclusionary answer, that when he was a produce clerk in the Eureka store his "supervisor" was Schmidt.

Alan Workman testified that his current "supervisor," McKenzie, does the same work that he does, but that, since McKenzie is "senior" he tends to such things as authorizing checks to be cashed if they're over a certain amount.

Gerald Wolf, a longtime employee, said that he was the "meat manager" at McKinleyville, and that his "supervisor" is Schilowsky. On cross-examination, however, he readily stated that Schilowsky does not give him work instructions and that during all his years at the store Schilowsky was a member of the Union just as he was. Wolf went on to testify that if he has a problem at work he usually takes it up with Schilowsky.

5. Solicitation of signatures by Schilowsky and Schmidt

Schmidt denied that he performed any solicitation on his own worktime (even though Respondent conceded that it may well have occurred on either his own or others' worktime, and on company premises, and with Respondent's knowledge). Schmidt claimed that it was his idea, and his wording, on the petition to get rid of the Union. He denied generally and specifically that he was given assistance by Respondent in drawing up the petition. He admitted handing the petitions to Respondent after the requisite signatures were obtained.

Schilowsky testified that he was the one who got the first two signatures on the petition, after getting it from Schmidt. He also admitted that he'd asked employees Swanson and Rosser to take it to other stores to get signatures. He denied talking to Pete or Charley Anderson about the petition. He stated that he didn't know whether management knew of his getting the petition signed. He also denied having asked others to sign, though he did present them with the opportunity. He admitted others that the petition was in his desk if they wanted to sign it. He admitted that this could have occurred on worktime. He said that he never talked with Schmidt about which petition to get done first, just as long as it was done before the contract expired. He stated that it is common for employees to talk about the union contract each time it comes up, and that they always have done so.

Kenneth Griffin, now a produce clerk in Eureka, began his employment with Respondent in 1979. For about 5 years, until about 5 years before this trial, he was a "manager" and, as such, received a bonus, just as did other managers, such as Schmidt and Schilowsky. His immediate "supervisor" currently is Schmidt. He first heard of the petition when he heard of an employee named Parker being called to the office and told to sign it. In January 1995, Schmidt approached him at work, during worktime, and asked if he'd heard of it. Schmidt asked him if he would sign it, and Griffin said that he wouldn't at that time. He acknowledged that when Schmidt asked him to sign the petition he also said that he didn't have to do so. About a week later, Griffin asked to, and did, speak with the store's owner. Griffin asked questions about what would happen to the older employees, such as himself. Griffin recounted that, speaking of the prospective opening of a new store, stated that it was likely that a lot of new employees would be hired. Then, so Griffin testified, about a week later Schmidt again asked him if he was going to sign the petition, and Griffin told him that he wasn't. Schmidt stated, fine, that he had enough. In Griffin's opinion, there was no way that Respondent could not have been aware of Schmidt's activities, given the small size of the store, and the fact that "everyone talks so much." On January 25, 1995, Griffin came to the store to pick up his check and was told by an assistant manager that the union's representative, Barling, had said that Schmidt could not come to a union meeting that night, whereupon an employee standing nearby exclaimed his approval, but a supervisor, overhearing, stated that he was going to make sure that Schmidt got a lawyer to sue.

According to Tanski, a generally credible witness, Schmidt said to him at the store that there was a petition being circulated and "if you want to you could sign it." Schmidt said the Union "hadn't done anything for us, and employees could trust Pete." According to Tanski, he said he'd think about signing it. Then, later, he asked Pete about going nonunion. Several people suggested it, among them Schmidt, who said he could talk to Pete himself if he had doubts. "I asked Pete what advantages if he went nonunion." Pete told him he would not have to listen to the Union, and that he believed in treating employees fairly and giving good wages. However, he also recalled that when he asked Pete about the petition, Pete told him he couldn't talk about it.

Nancy Mohorovich credibly testified that she was asked by Schmidt to sign the petition on January 11, 1995, while on break and he said he wondered how she felt about the petition. She replied that she didn't have a problem with it. He said some would be grandfathered. She didn't sign then. When she went back to work, however, she sent the boxboy back to Schmidt. A few minutes later Schmidt said she'd forgotten to sign, so another few minutes later she signed it at the checkstand. She didn't know if Schmidt was on his

worktime or not. She also testified that employees have "always" discussed the Union openly, and during worktime.

Keith Fidjeland credibly testified to the effect that Schmidt told him the petition was available if he so desired. He didn't know if Schmidt was on his worktime, but just that Schmidt said he was circulating a petition, as he felt we weren't getting our money's worth from the Union. Fidjeland recalled that he expressed some concerns and Schmidt replied that he should go talk to Pete Vellutini if he wanted to, since his door was always open. Fidjeland did go talk to Pete Vellutini in late January 1995, and told him some of his concerns. Vellutini's response was "to reassure me that nothing would change if we did decide to go non-Union."

Avelino Homem credibly testified that, "That morning Earl Schmidt come to the meat department to have coffee. He always comes in the morning to warm his water in the microwave, and I ask him, you know, what are you talking about. I was talking to him. And then, you know, we talk. But I don't remember what we said. And, you know, I talked to him. I was going to talk to Pete. Ask him before I signed." Typically, he testified as follows:

> Q. Do you remember anything that Mr. Schmidt—that Earl Schmidt said?
>
> A. No, I don't remember.
>
> Q. Do you remember anything that you said to him?
>
> A. No. We just talking, but I don't remember. It was so long ago, so—

He recounted that he went and talked to Vellutini before signing the petition in order to seek reassurance that nothing would change if the employees went nonunion. He received that assurance from Vellutini.

Robert Parker testified to the effect that first heard of the circulation of a petition in the meat department by rumor, and that, later, Schmidt permitted him to sign the petition. As he recalled, a couple of days later Schmidt called him by intercom upstairs to an office, and he went up. He said that Schmidt and he talked it over, and Schmidt said he could sign then or think it over. He recalled Schmidt said the Union wasn't doing all it could, and that Schmidt also said that he could sign if he wanted to. Parker didn't know if Schmidt was on worktime.

Douglas Grant, a clerk and part-time grocery manager in McKinleyville, credibly stated that it was Schmidt who asked him to sign the petition in January 1995, at the store, that Mark Carey was there also, and that he doesn't know if Schmidt was on worktime when he talked. Grant recalled that he and Schmidt differed as to whether or not the petition was "legal" or not. He recalled that Carey stated that he was not going to sign it. He also recalled that Schmidt assured him that if the petition succeeded things would stay the same in the store. Grant further stated that a couple of weeks later Schmidt came up again, and they had another conversation in which each of them repeated basically what had been stated in the earlier conversation.

Alan Workman, a clerk in Eureka, credibly testified that after he heard of the petition he talked of it to lots of his friends, whom he sought out. He also recalled speaking of it to Schmidt sometime in the winter of 1994–1995. They were in the back of the store, but he didn't recall whether or not they were on worktime. Essentially all he recalled was that Schmidt told him, while responding to his questions, that he could talk to [ ] if he had questions. Workman, while having his memory refreshed by counsel for the General Counsel, also testified that, after he and Schmidt had a conversation at the store about the petition which was circulating, he went to see Pete Vellutini. He asked Vellutini why he wanted to go nonunion, and Vellutini responded that it was due to the disruption that had occurred during the last negotiations, and the general animosity which ensued.

Sherry Dunsing, who used to be a longtime employee in McKinleyville, testified credibly that she was solicited by Schmidt at the store, and that she signed while she was working as a checker. She also stated that she said then that she was didn't really want to sign, but that she was doing so because she didn't want to be a black sheep among other employees, to which Schmidt responded that she didn't need to feel that way, and that she should sign if she wanted to. She stated that throughout her tenure employees had freely and openly discussed the Union at any time. She recalled that Schmidt mentioned that if the petition succeeded that they should try for a pension plan, and that they discussed other possibilities to benefit employees. She also recalled Schmidt saying that they'd have to just trust Vellutini not to change things so as to do harm to all the older employees if the petition succeeded.

Gerald Wolf credibly testified that he was solicited to sign the petition for the meat department by Schilowsky. He also went on to testify about having seen Schmidt talking to "Sherry" at some later time at the store, but it is unclear just what they were talking about. (Given Dunsing's testimony on this matter, however, this failure seems unimportant.) Wolf's further testimony about seeing Schmidt in the store while admitted supervisors were discussing the planning of a new store is so unclear to me in its details that I make no further mention of it.

Ron Boone, a courtesy clerk with over 1 year's tenure in McKinleyville, acknowledged that he was solicited by Schmidt at the store in December 1994, to sign the petition. Boone did sign the petition at that time, after seeing the signatures of all the other employees on it.

Mark Carey,[4] a clerk and assistant manager at McKinleyville, was asked to sign the petition in January 1995, at the store, around 1 p.m., with Schmidt and employees Bill Gatlin and Doug Grant present. According to Carey, Schmidt initially started out talking about the plans for the new store to be built, which led into the conversation about the petition. Summarizing Carey's recollection, the first thing Schmidt said was:

[4] On balance, I cannot find that Carey was credible. Clearly, he was biased against Respondent in each instance he could find to magnify supposed faults and flaws, or to construe events in a way to find fault with Respondent. Although he had a workmen's compensation claim pending against Respondent at the time of this trial, I do not find that this, by itself, lessened his credibility. I do find and believe, however, that though he was afforded chance after chance to show that his testimony was not affected by his unfavorable opinions about Respondent's management's fairness he failed time after time to avail himself of those chances. In short, while I do not find him to be an out-and-out fabricator, in the end, I find that I cannot accept his words at face value, and must discount them substantially in any instance where they are adverse to the Respondent's interests.

[He] asked me if I heard about the new store, and I said yes. He mentioned to Doug and I that we'd probably get better hours with the new store, working hours. And then he asked me—he stated that, or he said that you probably heard about the petition going around, and I said yes. And he started telling me, he started to say that he didn't think we needed the union, they didn't do much for us, and he was tired of paying dues. And that a lot of other people felt the same. And that he had a petition to get out of the union that he was asking people to sign. He stated that most of the Eureka employees had already signed it, as well as the Fortuna and McKinleyville. And he wanted me to sign it. I asked him, you know, if we lost the union how would we have any protected rights as far as benefits or wages, things like that. He stated that nothing would change, that Pete would take care of the employees. And if we didn't like it, if we voted the union out and we weren't happy with it later, we could vote it right back in. We could also have a employees' committee, something along that lines, to air our grievances. And that if I had any questions or anything like that to go ahead and talk to Pete about it. Doug Grant and I both disagreed with some of these points. Doug said he didn't feel comfortable with this. And that he didn't think voting the union out was a very good idea. I agreed with that. But Earl insisted that things would stay as they were, just minus the union. I was on worktime, and I believe, due to the time of day, and Schmitz' clothing, that he was also on worktime. A supervisor, Richard Anderson, was in the store, and I think he could overhear our conversation. While he was in the store that day, Schmidt also talked to other employees, though I can't be positive about what he talked about. Schmidt didn't show me the petition that day. A couple of weeks later, Schmidt approached me again at the store, during normal worktime, and asked me again to sign. I told him I wasn't for this idea of getting rid of the union and I wasn't going to sign this petition. And I really didn't want to talk to him anymore about it.

Carey told Schmidt that he thought it was a lot of "bullshit." Schmidt said nothing more and left.

Carey never did sign the petition. Carey went on to testify that he'd seen Schmidt discipline a few people in the past, naming Jeff King, a produce employee. According to Carey, Schmidt and King had an argument one morning, or afternoon, about the way Jeff was setting up the produce racks; he wasn't doing it according to the way Schmidt wanted, and they had a argument in the aisle of the Eureka store. However, Carey ultimately conceded that King gave as good as he got in this exchange, which lasted in excess of 10 minutes. Carey conceded that he had no knowledge as to whether or not King ever received any "discipline" from Respondent as a result of this exchange with Schmidt, and that he had no idea whether or not Carey ever complied with Schmidt's ideas as to how the job should be done. He recalled no other incidents of Schmidt disciplining anyone.[5]

Carey stated that Schmidt never told him that he didn't have to sign the petition; on the other hand, he admitted that Schmidt neither said nor hinted that any benefit would come his way if he did sign, or if he went and talked to Pete. As to whether or not Schmidt ever ordered him to sign the petition, Carey testified, "No, he couldn't order me, no. He didn't." Carey admitted that Schmidt did no more than other employees commonly did in discussing the prospects of employees as they might be affected by the opening of a new store by Respondent, but went on to object to Schmidt talking to him about it because, in his opinion

> THE WITNESS: Earl is part of management; Earl is a good friend of Pete's. And he's certainly not on the employees' side. He's on their side.
>
> JUDGE HERZOG: Okay. And that's—
>
> THE WITNESS: It's about as simple as I can put it.[6]

Continuing, Carey acknowledged that he recalled that Schilowsky and Schmidt had been expelled from the Union much earlier, because of their penchant for dominating union meetings. However, he continued to assert that Schmidt was a member of management, viz:

> JUDGE HERZOG: I see. Now you mentioned that Mr. Schmidt was a member of management.
>
> THE WITNESS: Yes.
>
> JUDGE HERZOG: Can you tell me what leads you to that conclusion?
>
> THE WITNESS: Well, he's the head—
>
> JUDGE HERZOG: What have you seen, what have you observed?
>
> THE WITNESS: He's the head produce man for all three stores. He's involved in the buying of the produce. He's involved in setting up at least the produce part of the ad. I believe he has final say over the schedule for the produce people in the different stores.
>
> He's had people, produce people transferred to different stores.

Carey stated that he has also heard about Schmidt chewing people out, and that he is involved in scheduling of employees' work and vacations. Ultimately, he acknowledged that, while he is of the opinion that such scheduling is frequently done unfairly, his knowledge is premised on "scuttlebutt." He also acknowledged that he has no knowledge as to what standards are used to set schedules for work, vacations, transfers, etc., though he believes that "fairness" should be the watchword. Further, while Carey claimed that Schmidt was charged with the advertising for Respondent, he admitted that he had no knowledge as to the discretion afforded those who placed ads with local media, and how much of that discretion may have been merely ministerial. Contrary to all other witnesses, Carey testified that in his store no employees ever discussed the Union openly.

[5] As with other witnesses, Carey was not permitted to testify whether Schmidt had been observed attending the same social functions as members of Respondent's management, or even being in their company at such a function.

[6] Carey went on to complain of a number of instances which he believed justified his opinion that Respondent's management simply did not treat employees fairly or with consideration. Suffice it to say, though given much opportunity, he was unable to supply details with accuracy or credibility.

agement. Surely, one or more of those who were encouraged to go and speak to Vellutini must have mentioned how they came to be there. Moreover, the stores are small, and the number of employees involved is also small. As the evidence showed, employees there have "always" talked about such matters at work, freely and openly.

I do not accept the further argument that because of this Respondent had a duty to disclaim their actions, which, if it did, it obviously failed. In my view, there has been no showing that there was any activity occurring which warranted disclaimer (or which, had there been a disclaimer, might not have led to a charge of interference by the employer). So far as appeared, the men were doing what employees had always done, carrying on conversations during worktime concerning the Union, or anything else they might wish to discuss. Other employees were shown by the evidence to be giving voice to their opinion that signing the petition was not a good, or "legal," thing to do. Under such circumstances, I see no warrant, much less a duty, to disclaim.

Finally, I find that the evidence of Vellutini's comments to employees who came to speak with him about the petition does not lead to a finding of a violation. True, he expressed his view that he preferred to operate nonunion, and that "things wouldn't change," and that he had tired of the turmoil of negotiations. However, I cannot find that he exceeded the bounds of permissible speech.

Accordingly, I find and conclude that the General Counsel has failed to establish that the petitions received by Respondent were tainted.

Summarizing, I find and conclude that counsel for the General Counsel has failed to establish a prima facie case by the preponderance of the credible evidence in any respect alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed in its entirety.

[7] All outstanding motions, if any, inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Whether someone acts as an agent under the National Labor Relations Act must be determined by common law principles of agency. *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995) (citing Cong.Rec. 6858–59 (1947)—remarks of Senator Taft). These common law principles of agency incorporate principles of implied and apparent authority:

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. Restatement 2d, Agency §27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id. at §8.

Dentech Corp., 294 NLRB 924, 925–926 (1989), quoting from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988). See also *Great American Products*, 312 NLRB 962, 963 (1992). Stated in a more subjective manner, "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993). In these cases, the burden of proof is placed on the party asserting the agency relationship, in this case the General Counsel.

Here, counsel for the General Counsel offered evidence of a plethora of alleged indicia of such apparent authority, such as:

- Playing golf with the boss
- Attending Christmas fetes
- Taking-out-of-town trips with the bosses
- Having shared access to a desk nearby where the bosses have an office
- Having access to an intercom
- Friendliness toward Vellotini
- Willingness to urge employees to trust Vellotini
- Predicting that things would remain the same if the Union were rejected
- Telling employees that getting rid of the Union was "legal"
- Making up advertisements and/or transmitting them to the media
- Appearing in ads
- Ordering goods for Respondent
- Setting prices on goods

I find that the evidence is credible that there were many occurrences of a number of the types of conduct which she points to.

Of course, there were other instances where I am convinced that either the conduct did not occur, (e.g., Christmas fetes), or is too remote in time to have relevance here, (e.g., golfing, rumored to have been with the boss).

But, even in those which I find to have occurred, I find that they do not indicate either "agency" or "apparent authority." For example, it is no doubt true that Schmidt accompanied management on several out-of-town trips, but the record shows no reason to conclude that he did so in any capacity other than as an employee, selected because of his long tenure and expertise to give advice. Certainly that explanation is at least as plausible as that conclusion which is urged by the General Counsel, i.e., that these were "signs of a special status" conferred on him by management. Here, I see no reason to find the General Counsel's scenario as more likely than the innocent one which I see as at least equally plausible.

Similarly, the fact of making up ads, or ordering goods, or sometimes working in what amounted to a shared cubbyhole upstairs near the bosses' office do not add up in my opinion to nondiscretionary acts of a ministerial nature, or signs which are so minimal or equivocal that they are not legally significant here.

Finally, I see no warrant to find that Schmidt's expressions of views concerning the Union or the petition, or his personal feelings toward Vellutini, or who other employees should trust, has any tendency to confer authority.

Here, the General Counsel goes further, however, and argues that if such facts "could" lead to employees coming to the conclusion that Schmidt possessed "apparent authority" then I must find that he did. I disagree.

For responsibility of conduct of statutory supervisors who are also bargaining unit members will not be imputed to the employer in the absence of evidence that the employer "encouraged, authorized or ratified" such conduct or that the employer "acted in such a manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management." *A.T. & K. Enterprises*, 264 NLRB 1278, 1283 (1982), quoting *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957).

Thus, I reject the General Counsel's argument that, regardless of what the Respondent did or did not do to clothe a person with authority, a finding of apparent authority may be premised upon the mere possibility that employees could believe that such authority existed. Instead, I find that "apparent authority" must be based on some action taken by the principal. *Montgomery Ward & Co.*, supra. I disagree with her premise that apparent authority can spring solely out of the minds of those who observe it in a case such as this where the alleged agent is a member of the bargaining unit, and where I make no finding that the employer acted in such a manner as to lead employees reasonably to believe that the agent was acting for or on behalf of management.

I accept the General Counsel's argument that the actions of the two men, especially Schmidt, were carried out with such openness that they "must have" been known to man-

D. *Analysis and Conclusions*

On this evidence I conclude that the Union and Respondent were parties to valid collective-bargaining agreements as of the latter part of 1994 and that, in response to the Union's request to begin negotiations toward successor contracts, Respondent refused to negotiate based on its asserted good-faith doubt of the Union's continuing majority status. Such "doubt" was premised on petitions which Respondent had timely received, which bore the signatures of a majority of the employees in each of the units.

The existence of a prior contract, lawful on its face, is sufficient to raise a dual presumption of majority, first that the Union had majority status when the contract was executed and second that a majority continued at least through the life of the contract. Following the expiration of the contract, the presumption continues, and the burden of rebutting it rests, of course, on the party who would do so. *Pioneer Inn*, 228 NLRB 1263 (1977).

However, the presumption may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status.

The good-faith doubt must be based on objective considerations and must not have been advanced for the purpose of gaining time in which to undermine the Union. The assertion of a good-faith doubt must be raised in a context free of unfair labor practices. *Terrell Machine Co.*, 173 NLRB 1480, 1480–1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970); *Pioneer Inn*, supra.

Thus, since it seems clear, and undisputed, that Schmidt and Schilowsky were the galvanizing and moving forces behind each of the petitions, it follows that the petitions would be deemed "tainted" if either of them were found to be supervisors and/or agents of Respondent. In other words, no employer is free to manufacture its own basis for asserting doubt of a union's majority status.

The General Counsel alleges that the actions of Schmidt and Schilowsky must be attributed to Respondent because they are supervisors and/or agents within the meaning of Section 2(11) and (13) of the Act. The General Counsel argues that their supervisory status is shown because of the presence of such factors as the direction of the work of employees, making, and modifying work assignments. Respondent argues that they do not have the authority to responsibly hire, fire, discipline, or discharge employees; nor can they assign overtime, and therefore neither is a supervisor under the Act. Moreover, says Respondent, they were until fairly recently included in the Union, and were even up to the end of the collective-bargaining agreements included in the unit.

The burden of proving supervisory status is on the party asserting that status. *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982), enfd. 703 F.2d 577 (9th Cir. 1983); *Bakers of Paris*, 288 NLRB 991 (1988), enfd. 929 F.2d 1427, 1445 (9th Cir. 1991).

Section 2(11) of the Act provides that:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Here, I am not persuaded by the evidence that either man is a supervisor.

First of all, there is no evidence that either has been specifically denominated by Respondent as a "supervisor." The fact that each is called a "manager" is not persuasive, especially in view of the fact that a number of other employees also bear such lofty titles. A title in and of itself is insufficient to confer supervisory status. *Davis Supermarkets*, 306 NLRB 426, 458 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993).

Nor does their supervisory status seem clear when one views the evidence of employees who testified about the subject. Tanski spoke of Schmidt giving him work instructions only occasionally. Similarly, Wolf's testimony that Schilowsky is his supervisor is unpersuasive since it fails to even establish that Schilowsky gives independent work instruction, over and above advice whenever a problem is encountered. This especially true in light of the fact that Schilowsky performs the same work as he does. Parker's testimony that Schmidt was his "supervisor" at one time is unpersuasive in view of the preceding paragraph, as well as the fact that it was clearly mere conclusionary testimony, having no support by testimony to support those facts. Workman's testimony concerning how his supervisor, McKenzie O.K.'s checks over a certain amount is unpersuasive in and of itself that McKenzie, much less Schmidt or Schilowsky, possessed the sort of independent authority needed to qualify as a supervisor.

In my opinion it has not been shown that either man responsibly directs employees or independently authorizes time off. Moreover, no evidence indicates that either utilizes independent judgment in assignment of work. Accordingly, I find that they are not supervisors within the meaning of Section 2(11) of the Act. See, e.g., *Clark Machine Corp.*, 308 NLRB 555, 556 (1992) (despite fact that employees considered Woolfrey to be supervisor, fact that he assigned work, transferred employees, and instructed employees to correct mistakes, Woolfrey was an employee because his assignments did not involve independent judgment and he merely pointed out obvious flaws in work); *Quadrex Environmental Co.*, 308 NLRB 101 (1992) (communication of routine instructions and assignment of tasks predetermined by management indicative of lack of sufficient discretion to be statutory supervisors). Nor is the fact that they may receive bonuses sufficient. Secondary, nonstatutory indicia of supervisory status such as salaried compensation or lack of supervision if this employee is not a supervisor are insufficient alone to confer statutory supervisory status. *Billows Electric Supply*, 311 NLRB 878 (1993).

In sum, I find and conclude that the General Counsel has failed to establish by a preponderance of the evidence overall that either Schmidt or Schilowsky acted as a supervisor for Respondent.

However, the General Counsel also asserts that the actions of the two men tainted the petitions which they secured because they were acting as agents of Respondent, and had Respondent's "apparent authority."